



# EPA & USACE Issue Clean Water Rule

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Today, the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("USACE") released the final Clean Water Rule, which is intended to clarify regulatory confusion over which streams and wetlands constitute "waters of the United States," and are therefore subject to Clean Water Act ("CWA") protection. According to the EPA and USACE, the rule:

- Redefines and clarifies what constitutes a tributary;
- Provides certainty regarding how far CWA protections extend into downstream waters, making permitting easier, less costly, and faster for businesses and industry;
- Offers guidance regarding specific water features, including prairie potholes, pocosins, western vernal pools, and coastal prairie wetlands;
- Clarifies the types of erosional features and ditches that are covered by the CWA;
- Limits the use of case-by-case analysis of waters; and
- Does not purport to change the status of waters within Municipal Separate Storm Sewer Systems.

In their briefing for Congressional staff, EPA Administrator Gina McCarthy and Assistant Secretary for the USACE Jo Ellen Darcy referred to the final Clean Water Rule as "narrower" than the proposed version, and then went on to state that they believe it will increase jurisdictional waters by 3%.

Opponents of the rule, including farmers, ranchers, homebuilders, and oil and gas interests, assert that the rule is an attempt by the federal government to exert its CWA permitting jurisdiction over waters that should not be subject to EPA and USACE oversight, including (contrary to Supreme Court decisions) areas without a substantial connection to water resources. Opponents also argue that the rule will cause significant economic harm, with little environmental benefit.

The controversy surrounding the final rule is also playing out in Congress. In April 2015, the House Appropriations Committee approved the fiscal year 2016 appropriations bill with a rider that would expressly prohibit the EPA and USACE from using any appropriated funds for the final Clean Water Rule. The funding

prohibition, referred to as the Waters of the United States Regulatory Overreach Protection Act (H.R. 594), was proposed by Representative Gosar (R-AZ) and 103 other members of Congress in January 2015. After the appropriations bill was approved with the rider, Rep. Gosar stated: "I am very pleased to see my House colleagues on the Appropriations Committee accommodate my request, supported by 103 bipartisan members of Congress, to block all funding for the EPA's proposed water grab. The House must utilize the power of the purse to stop the EPA from imposing devastating economic consequences for farmers, ranchers and small businesses throughout the country."

In addition, Senator Dan Sullivan (R-AK), Chairman of the Environment and Public Works Subcommittee on Fisheries, Water & Wildlife, signaled intent within the Senate to move quickly to pass the Federal Water Quality Protection Act (S.1140), bipartisan legislation intended to clarify jurisdiction and prevent an expansion of federal authority.

In addition to facing political opposition, it is anticipated that legal challenges to the Clean Water Rule will be filed within the next 60 days, before the rule is scheduled to take effect.

Make sure to check back with us, as we are preparing another E-Alert that will take you through the weeds of the final rule. In the meantime, if you have any questions, we are here to answer them.